No. 97-7597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PATRICK KNOWLES,

Petitioner,

—v.—

STATE OF IOWA,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE IOWA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE IOWA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The Iowa Civil Liberties Union is its statewide affiliate. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. Because this case addresses an important Fourth Amendment question, its proper resolution is of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

According to §805.1(1) of the Iowa Code, an officer who has grounds to make an arrest for a bailable offense "may issue a citation in lieu of making an arrest." Section 805.1(4) of the Iowa Code further provides that the "issuance of a citation in lieu of arrest . . . does not affect an officer's authority to conduct an otherwise lawful search." The Iowa Supreme Court has interpreted this statute to mean that an officer who may take a person into custody for an offense, but instead elects to issue a citation, may "conduct a search of the same scope as the [C]onstitution authorizes for a search incident to custodial arrest." *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995). Thus, an officer may conduct a full search of the cited individual's person and the

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

area within his or her immediate control. *Id.*; *State v. Meyer*, 543 N.W.2d 876, 878-879 (Iowa 1996).

Iowa law permits an officer to make a custodial arrest of a person whenever there is probable cause to believe that that person has committed a traffic offense in the officer's presence. *State v. Cook*, 530 N.W.2d at 732. Consequently, a driver who is given a citation for any traffic offense in the officer's presence may be subjected to full searches of her person, the entire passenger compartment of her vehicle, and any containers found therein.[2]

On March 9, 1996, Patrick Knowles was stopped by a police officer for driving at an excessive speed. After determining that Knowles' license was valid and that there were no warrants for his arrest, the officer issued a citation for speeding. The officer searched both Knowles and the passenger compartment of his vehicle. Knowles was arrested when the officer found marijuana and a pipe under the driver's seat. He was ultimately charged with possession of marijuana and keeping marijuana in a motor vehicle.

Knowles moved to suppress the evidence found in his vehicle, claiming that the officer's searches had violated the Fourth Amendment. At an evidentiary hearing, the officer conceded that he did not have probable cause or reasonable suspicion that Knowles was involved in any criminal activity other than speeding and that Knowles did not consent to the

[2] *See State v. Knowles*, 569 N.W.2d 601 (Iowa 1997)(search under driver's seat pursuant to citation for speeding); *State v. Doran*, 563 N.W.2d 620 (Iowa 1997)(search of person pursuant to citation for lack of proper motorcycle lighting); *State v. Meyer*, 543 N.W.2d 876 (search of open canister in passenger compartment pursuant to citation for speeding); *State v. Cook*, 530 N.W.2d 728 (search of passenger pursuant to citation for failure to wear seat belt).

searches performed. The officer admitted that the sole justification for the searches was that they were "incident to the citation" for speeding. The trial court denied the motion to suppress, found Knowles guilty of both marijuana offenses, and sentenced him to concurrent 90-day terms of imprisonment.

Knowles appealed the suppression ruling to the Iowa Supreme Court, challenging the constitutionality of the statutory authority to conduct searches incident to citation.[3] In a 5 to 4 decision, the court concluded that the officer had performed a search authorized by §805.1(4) of the Iowa Code and that the searches authorized by that provision are not "unreasonable" under the Fourth Amendment. Consequently, the court affirmed Knowles' convictions.

SUMMARY OF ARGUMENT

The state's position in this case -- that police officers may conduct otherwise unjustified searches incident to traffic citations -- cannot be reconciled with the Fourth Amendment's core requirement of reasonableness. It conflicts with the practice at common law, this Court's precedents, and a proper balancing of the relevant individual and governmental interests involved. At common law, the search incident to arrest doctrine permitted searches only when officers had

[3] Knowles argued that the searches in this case were invalid because a search incident to a mere citation always violates the Fourth Amendment. He also contended that the searches in this case were invalid because a custodial arrest for speeding would be an unreasonable seizure under the Fourth Amendment. The Iowa Supreme Court did not address the validity of a custodial arrest for speeding because that issue "was not raised in the motion to suppress before the district court." *State v. Knowles*, 569 N.W.2d at 603.

taken, or were in the process of taking, an individual into custody. Only then were the two justifications proffered for such searches -- preventing escape and preserving evidence -- applicable. Detentions for purposes of issuing traffic citations were not known to the common law. The closest analogy seems to be the approved practice of detaining suspicious persons for purposes of investigation. During such detentions, officers had no authority to search the person detained.

The search incident to arrest doctrine permits exceptional warrantless searches not based on probable cause or any level of particularized suspicion. Both the language and the reasoning of the Court's opinions strongly suggest that that doctrine requires an actual custodial arrest. Only when an individual is taken into custody are there distinct opportunities and motivations to escape, to eliminate evidence, and to threaten harm to arresting officers. These special circumstances have provided the basis for a conclusive presumption that a warrantless, suspicionless search is nonetheless reasonable. In addition, the *Terry* doctrine holds that when an officer merely detains an individual he may conduct *only* a limited patdown search for weapons *if* he has a reasonable suspicion that the person is armed and dangerous. Logically, those same limitations should be imposed on the authority to search during a routine traffic stop.

The balancing of interests that underlies all Fourth Amendment reasonableness determinations also tips decidedly against permitting routine searches incident to traffic citations. The intrusions on individual privacy interests are severe. Full searches of persons, their vehicles, and their private repositories seriously interfere with reasonable expectations of privacy, which is why such searches can ordinarily be justified only on a showing of probable cause. On the other hand, the government interests in conducting searches in the absence of a custodial arrest or particularized

suspicion are minimal, at best. In a routine traffic stop, an officer can show nothing other than probable cause to believe that a traffic violation has been committed. That showing does not give rise to any interests that would be served by searching the motorist, his vehicle, or his possessions. When an offender is taken into custody, additional interests in preventing escape, officer safety, and the preservation of evidence are present. When the offender is merely cited, those interests are generally absent. Because searches incident to traffic citations would deprive countless innocent citizens of constitutionally protected interests in privacy, dignity, and liberty, and serve no substantial public interests, they must be deemed unreasonable.

According to the Iowa Supreme Court and the statute it interpreted, a search incident to a traffic citation is reasonable whenever an officer "could have" taken the cited motorist into custody and "could have" searched the motorist if he had taken him into custody. This "could have" reasoning is seriously flawed. It overlooks the fact that, unless there is an actual arrest, there is no significant public interest that can justify a search. Moreover, "could have" reasoning has almost unlimited potential to erode well-established Fourth Amendment protections. Carried into other contexts, it could threaten to undermine numerous search and seizure holdings that rest on logical, substantive grounds. What is reasonable under the Fourth Amendment depends not on what could have happened, but on what did happen.

Finally, requiring that an individual be arrested as a predicate for permitting a search incident to arrest provides appropriate clarity and guidance in the law of search and seizure. An objective standard that permits searches whenever there is a formal arrest or its functional equivalent has precedential support, is comprehensible, and is faithful to Fourth Amendment values.

ARGUMENT

I. COMMON LAW, THIS COURT'S PRECEDENTS, AND THE BALANCE OF STATE AND INDIVIDUAL INTERESTS ALL SUGGEST THAT SEARCHES JUSTIFIED SOLELY ON THE GROUND THAT THEY ARE INCIDENT TO CITATION ARE UNREASONABLE UNDER THE FOURTH AMENDMENT

A. Common Law Power To Search Incident To Arrest Did Not Extend To Lesser Detentions Where The Suspect Was Never Taken Into Custody

While common law authorities on the power to search incident to arrest "are sparse," *United States v. Robinson*, 414 U.S. 218, 230 (1973), the sources that do exist provide powerful reasons to conclude that the search incident to arrest power does not encompass searches incident to citation.

As early as *Weeks v. United States*, 232 U.S. 383, 391 (1914), the Court observed that "the right . . . of the government . . . to search the person of the accused when legally arrested" had "always [been] recognized under English and American law." For support, the *Weeks* Court, *id.* at 392, cited *Dillon v. O'Brien*, 7 Am. Crim. Rep. 66, 70, a case holding that the recognized authority to conduct a search "upon a lawful *arrest* . . . of one charged with treason or felony" extended to misdemeanants (emphasis added). In arriving at this conclusion, the *Dillon* court referred to the "power" as one that "the law gives to the officer in whose *custody* a person charged with a crime lawfully is," *id.* at 71 (emphasis added), and described the "right" as one that had to be based "upon an allegation of actual guilt and a lawful

apprehension of the guilty person." *Id.* at 73 (emphasis added).[4]

In *People v. Chiagles*, 237 N.Y. 193 (1923), a case relied upon by the majority in *United States v. Robinson*, then-Judge Cardozo engaged in an analysis of the common law, concluding that the "basic principle" that emerged was that a "[s]earch of the person becomes lawful when *grounds for arrest* and accusation have been discovered, *and* the law is *in the act of subjecting the body of the accused to its physical dominion.*" *Id.* at 196 (emphasis added); *see also Smith v. Jerome*, 93 N.Y.S. 202, 202-03 (1905)(concluding that the "power" to "search the person of one lawfully *arrested*" has "been exercised under the common law from time immemorial")(emphasis added). Thus, mere cause to arrest was not enough. Actual "physical dominion" of "the body of the accused was also necessary to trigger the common law authority to search.

Not a single authority suggested that it was legitimate to search an individual who had not been subjected, or was not being subjected, to the "physical dominion" of the officer. This restriction on the authority to search was no accident but, rather, was logically grounded in the two justifications for permitting such searches. At common law, the search of an arrestee was designed: (1) "to prevent the ab-

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[4] *See also* 1 Joel Prentiss Bishop Crim. Proc. §211 (2d ed. 1872)(referring to the authority of an "officer who *arrests* a man")(emphasis added); 1 Francis Wharton Crim. Proc. §97 (10th ed. 1918)(referring to the right to take property "from the person or possession of a *prisoner*," and the right to take "articles which . . . will aid in securing the conviction of the *prisoner*, or will prevent his *escape*," and stating that a search is justifiable as an "incident of a lawful *arrest* only; but if the *apprehension* be unlawful, the search is . . . unlawful")(emphasis added).

straction or destruction" of "material evidence of [the arrestee's] guilt or innocence as to his custody for the purpose of trial," *Dillon v. O'Brien*, 7 Am. Crim. Rep. at 71, and (2) to "prevent [the prisoner's] escape." 1 Wharton Crim. Proc. §97. Those justifications were relevant only when a person was taken into custody.

The common law did recognize the authority of officers "to detain suspicious persons." *See Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993)(Scalia, J., concurring). Thus, there were situations in which officers briefly seized individuals in public places, but did not take them into custody. While the precedents permitted such detentions, they did not authorize "a physical search of a person thus temporarily detained." *Id.* "When . . . the detention did not rise to the level of a *full-blown arrest* . . . there appears to be no clear support at common law for physically searching the suspect." *Id.* & authorities cited therein (emphasis added). Temporary detentions for the purpose of issuing traffic citations are much more like common law detentions of suspicious persons than they are like "full-blown arrests." Consequently, the common law prohibition on searches of detained persons would seem to preclude searches incident to traffic citations.

This is not an instance where changes in society or technology support an expansion of the traditional authority to search those custodially arrested to include those merely cited for traffic infractions. To the contrary, the development of motor vehicles and their increasingly indispensable role in modern life, coupled with the proliferation of minor traffic (and other) "crimes" unknown to the common law, militate against unjustifiable extensions of search incident to arrest authority in ways that jeopardize the constitutional privacy interests of countless innocent citizens. Many law-abiding people are apt to violate one of the myriad, minor traffic code provisions, thereby giving an officer grounds to

detain them for the purpose of issuing a citation.[5] Recognition of the authority to search incident to citation threatens unjustified privacy losses that are wholly incompatible with "that degree of respect for the privacy of persons," *Minnesota v. Dickerson*, 580 U.S. at 380 (Scalia, J., concurring), reflected in the common law rules and embodied in the Fourth Amendment guarantee.

B. This Court's Precedents Consistently Suggest That, In The Absence Of Actual Custodial Arrest, Full Searches Of Persons, Vehicles, And Possessions Are Unreasonable Without Probable Cause To Search

In *United States v. Robinson*, 414 U.S. at 236 n.6, the Court reserved the question of whether the search of a person incident to a citation given during "'a routine traffic stop'" could be constitutional (internal citation omitted). The precedents of the Court that shed light on that question are wholly consistent with the message of the common law. Both the language and reasoning of these cases provide weighty support for the contention that searches conducted incident to traffic citations, in the absence of probable cause to search, a warrant, or other particularized suspicion, violate the Fourth Amendment.

This Court has consistently described the search incident to arrest doctrine as predicated on an actual custodial

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[5] *See* Maryland v. Wilson, 519 U.S. __, 117 S.Ct. 882, 888 (1997)(Stevens, J., dissenting)(opining that traffic stops "amount to significant law enforcement activity" and that in "Maryland, alone, there are something on the order of one million traffic stops each year"); *id.* at 890 (Kennedy, J., dissenting)(under the Court's precedents, police are allowed "to stop vehicles in almost countless circumstances," a reality that "puts tens of millions of passengers at risk of arbitrary control by the police").

arrest. In *Chimel v. California*, 395 U.S. 755, 763 (1969), the Court held that "[*w*]*hen an arrest is made* it is reasonable for the arresting officer to search the *person arrested*" and "the area 'within his immediate control'" (emphasis added)(internal citation omitted). In arriving at that conclusion, the Court cited several earlier decisions, all of which used similar language in describing the predicate for the warrantless search authorized by the search incident to arrest doctrine.[6]

In *Robinson* itself, the Court described the search incident to arrest doctrine as permitting the full search of any person subjected to a "lawful *custodial arrest*" no matter what the nature of the offense for which he has been arrested. 414 U.S. at 234. Time and time again, the *Robinson* majority made it clear that the authority to conduct a warrantless, suspicionless search incident to arrest arises "after a police officer lawfully places a suspect *under arrest for the purposes of taking him into custody*." *Id.* at 227 (emphasis added); *see id.* at 234 ("The justification for . . . authority to search incident rests quite as much on the need to disarm the suspect *in order to take him into custody*") (emphasis added); *id.* at 236 ("[I]t is the fact of *custodial arrest* that gives rise to the authority to search")(emphasis added); *id.* at 232 (quoting Cardozo, *see supra* p.7).

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[6] *See, e.g., Trupiano v. United States*, 334 U.S. 699, 708 (1948)("A search . . . incident to a lawful arrest . . . grows out of the inherent necessities of the situation at the time of arrest")(emphasis added); *Agnello v. United States*, 269 U.S. 20, 29 (1925)("The right . . . to search *persons lawfully arrested while committing crime* . . . is not to be doubted")(emphasis added); *Weeks v. United States*, 232 U.S. at 392 (referring to "the right . . . to search the person of the accused *when legally arrested*")(emphasis added).

Similarly, in *New York v. Belton*, 453 U.S. 454 (1981), the Court concluded that when an arrestee is a "recent occupant" of a vehicle, the entire passenger compartment of that vehicle is presumptively within the arrestee's immediate control and, therefore, is subject to a search incident to arrest. Once again, the Court made it clear that the authority to search depended upon a "lawful *custodial arrest*." *Id.* at 459 (emphasis added); *see also id.* at 457 (referring to the "principle that limits a search incident to a lawful *custodial arrest*")(emphasis added); *id.* at 458 (question before Court is "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest")(emphasis added).

The reasoning underlying these consistent statements makes clear that the words "custodial arrest" impose a strict, logical limitation upon the proper scope of the search incident to arrest exception to the usual Fourth Amendment requirements. The search incident to arrest doctrine permits a search without a warrant, without any showing of probable cause to search, and without any evaluation of the need for a protective search in the particular case. Such searches are nevertheless conclusively presumed to be reasonable because of the extraordinary pressures and dangers created when a person is taken into custody. The authority to search is justified by the need "to remove any weapons that [the person arrested] might seek to use to *resist arrest or effect his escape*" and by the additional need, in many cases, to prevent an arrested person from concealing or destroying evidence. *Chimel v. California*, 395 U.S. at 763 (emphasis added). Inherent exigency and an obvious lack of time to seek judicial approval require an exemption from the warrant rule. The probable cause to search norm is suspended because of the inherent risk that an arrestee could have a weapon or evidence *coupled with* two other possibilities: (1) that a person taken into custody will be more *motivated* to attempt to es-

cape or harm an arresting officer or destroy or conceal evidence, and (2) that a person taken into custody will have a greater *opportunity* to endanger officers. When a person is being arrested, his motivation to use a weapon to "resist arrest or effect his escape" and to conceal or destroy evidence may well increase. Furthermore, "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station," *United States v. Robinson*, 414 U.S. at 234, provides an opportunity to extract and use a concealed weapon against an arresting officer. These substitutes for probable cause to search arise *only* in cases of custodial arrest. "It is the fact of custodial arrest which gives rise to the authority to search," *id.* at 236, because only actual custody generates reasons to search automatically.

By way of contrast, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that an officer may conduct not a full search, but a frisk, a narrowly circumscribed patdown of the outer clothing of a person who has been detained but not arrested. Moreover, an officer may do so only if he has a reasonable suspicion that the person is armed and dangerous. The Court has rejected efforts to impose *Terry*'s limitations upon the permissible scope of a search incident to a full custodial arrest. *See United States v. Robinson*, 414 U.S. at 228. Because arrests are unique in intrusiveness and in the societal interests they are designed to serve, the Court has decided that a bright-line presumption is justified and that case-by-case determinations of reasonableness are not required.

Routine traffic stops are like *Terry* detentions and are unlike custodial arrests in all important respects. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). These stops are "presumptively temporary and brief," *id.* at 437, do not involve physical transportation of the motorist to the police station, and do not make "the motorist feel[] completely at

the mercy of the police." *Id.* at 438. The intrusions on freedom and privacy are much less severe than the intrusions occasioned by custodial arrest. Unlike arrests, detentions for the issuance of traffic citations are not "'inevitably accompanied by future interference with the individual's freedom of movement.'" *United States v. Robinson*, 414 U.S. at 228 (quoting *Terry v. Ohio*). More important, the societal interests at stake in a traffic stop cannot justify privacy intrusions greater than those permitted by *Terry*. Thus, an officer may frisk, not fully search, a cited motorist only if the officer has reasonable suspicion that the motorist is armed and dangerous, and may conduct a limited weapons search of a vehicle's passenger compartment only based on a reasonable suspicion that the motorist is dangerous and may gain immediate control of weapons. *See Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983).[7]

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[7] Other decisions in the *Terry* line confirm the conclusion that *Terry* doctrine limitations should govern traffic stops. In *Minnesota v. Dickerson*, 508 U.S. 366, the Court held that an officer who is justified in patting down a suspect during an investigative detention must strictly confine his search to a tactile inspection, designed to detect large weapons, of the suspect's outer clothing. In *Dickerson*, the officer violated the Fourth Amendment because his manual manipulation of an object in the suspect's pocket went beyond the scope of a proper weapons frisk and was not supported by probable cause to search. According to *Dickerson*, a suspect properly detained on a reasonable suspicion of involvement in narcotics offenses cannot even be subjected to the quite limited privacy invasion involved in externally manipulating the contents of his pocket. This restriction applies even if the officer has a reasonable suspicion that the object is contraband. Surely, no greater intrusion is justifiable during a traffic stop.

In addition, in *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), the Court held that an officer may automatically remove a driver from a vehicle during a traffic stop, and in *Maryland v. Wilson*, 117 S.Ct. at 884, the Court held that passengers are also subject to automatic removal during legitimate traffic stops. In holding these "seizures" to be reasona-

(continued...)

C. Searches Incident To Traffic Citations Are Unreasonable Because The Intrusions Upon Individual Interests In Privacy, Liberty And Dignity Clearly Outweigh The Governmental Interests Served By Routine Searches Of Everyone Issued A Citation

Under the Fourth Amendment, "there is 'no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.'" *Terry v. Ohio*, 392 U.S. at 20-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)). Because probable cause is the norm, when a search or seizure is not supported by probable cause, detailed balancing is necessary to determine whether it should be exempted from the normal requirement. *See Whren v. United States*, 517 U.S. 806 (1996).

The intrusions authorized by Iowa law are nothing less than *full* searches of persons, their vehicles, and the private containers inside those vehicles. The search of a person's body is so serious an invasion of personal privacy that it ordinarily requires probable cause to believe that an item in which the government has a legitimate interest is concealed

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[7] (...continued)
ble without any additional showing of cause, the Court stressed the "minimal" nature of the intrusion involved in removing an already stopped driver or passenger from a vehicle. *Id.* at 886. The compelling "interest in officer safety" was thought to outweigh the "personal liberty" interests of drivers and passengers *only* because of the exceptionally limited nature of the infringement involved in removing a person from an already stopped vehicle. *Id.* The logic of these decisions strongly suggests that full-fledged searches of drivers, passengers, vehicles, or private possessions during routine traffic stops to issue citations are unreasonable.

on that person.[8] Full searches of the passenger compartments of vehicles and other containers also result in substantial privacy deprivations that ordinarily require probable cause to search.[9] The searches performed in Iowa incident to traffic citations constitute enormous and serious intrusions upon constitutionally protected privacy interests. Moreover, privacy interests are not the only casualty. Full searches of innocent motorists' persons are frightening affronts to their dignity. And the additional liberty that is lost while an officer engages in the thorough vehicle searches permitted by Iowa law can never be restored to the innocent motorist who has had the temerity to drive a little too fast, neglect to fasten her seatbelt, or fail to notice that her tail light had burned out moments before she was stopped.

On the other side of the balance, the public interests served by searches incident to traffic citations are insubstantial and speculative. The only demonstrated societal interest is in "prosecuting" the motorist (or passenger) for a traffic infraction. This interest is not served by a search. Ordinarily, there is no evidence to be found, destroyed, or concealed. Because an individual who receives a citation is not in extended, close contact with the citing officer, a search is not needed to protect the officer. Unlike an arrestee, a mo-

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[8] *See Minnesota v. Dickerson*, 508 U.S. at 375 (holding that the limited intrusion involved in tactile manipulation of an object from outside a suspect's pocket could not be justified on less than probable cause); *Ybarra v. Illinois*, 444 U.S. 85, 95 (1979)(holding that the search of a person for contraband is governed by the "'long-prevailing' constitutional standard of probable cause")(internal citation omitted).

[9] *See, e.g., California v. Acevedo*, 500 U.S. 565, 573-74 (1991)(while search warrant is not needed to search vehicle and containers, probable cause is necessary); *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (search warrant, based on probable cause, is required to search footlocker); *see also Arizona v. Hicks*, 480 U.S. 321, 325-26 (1987)(mere movement of a turntable requires probable cause).

torist who has been given a traffic citation does not have the opportunities that custody provides to extract a weapon and threaten an officer's safety, and does not have the powerful motivations that custody generates to escape, to harm the officer, or to destroy or conceal potential evidence. Although it is possible that a motorist who violates a traffic law will also happen to possess a weapon, *Terry* and *Michigan v. Long* allow officers to protect themselves from that possible danger by frisking (not fully searching) the individual or vehicle, as long as they have reason to believe that there is danger present in the particular situation. It is simply not reasonable to assume that motorists who are issued traffic citations present measurable risks that are in any respect comparable to those posed by arrestees. Unlike the fact of arrest, the fact of citation furnishes no basis for presuming the presence of the substantial government interests that alone can justify full searches of persons and their possessions.

Because routine stops for traffic violations "[i]n the aggregate, . . . amount to significant law enforcement activity," *Maryland v. Wilson*, 117 S.Ct. at 888 (Stevens, J., dissenting), and because "[m]ost traffic stops involve otherwise law-abiding citizens," *id.*, it is fair to assume that random searches of motorists incident to citation would result in substantial losses of privacy for countless innocent citizens.[10] This likely consequence weighs heavily against the

[10] The Fourth Amendment was in large part a reaction to the general warrants and writs of assistance that authorized government agents to search wherever they wanted upon a bare suspicion. *See* James J. Tomkovicz, *California v. Acevedo*: The Walls Close in on the Warrant Requirement, 29 Am.Crim.L.Rev. 1103, 1130 (Summer 1992). Those tools of oppression granted agents of the government nearly unfettered discretion "to choose whom, where, and what to search and seize." *Id.* at 1134. The authority and discretion to search without cause granted by (continued...)

reasonableness of automatic authority to conduct random searches incident to traffic citations.[11]

When the intrusion upon individual interests and the nature and magnitude of the public interests are placed on the Fourth Amendment scales, one conclusion is unavoidable. The state's interest in performing searches incident to traffic citations in circumstances where no particularized need to search can be demonstrated does not outweigh the damage to personal freedom and privacy inflicted by those searches. The balance tips decisively in favor of the individual.

II. AN ACTUAL CUSTODIAL ARREST, NOT SIMPLY PROBABLE CAUSE TO ARREST, IS NECESSARY TO JUSTIFY A SEARCH INCIDENT TO ARREST

A. A Search Incident To Citation Is Not Reasonable Merely Because An Officer "Could Have" Taken Steps That Would Have Justified A Search

Both the Iowa statute authorizing searches incident to citation and the state court opinions sustaining the validity of those searches rest on hopelessly flawed reasoning. According to that logic, because an officer who lawfully cited

[10] (...continued)
the search incident to citation doctrine threatens to inflict the same sorts of widespread, unjustified privacy deprivations.

[11] *See, e.g., Reid v. Georgia*, 448 U.S. 438 (1980)(rejecting a reasonable suspicion finding because of the threat to "a very large category of presumably innocent travelers"); *see also Maryland v. Wilson*, 117 S.Ct. at 888 (Stevens, J., dissenting)(expressing concern for "the potential daily burden on thousands of innocent citizens"); *id.* at 890 (Kennedy, J., dissenting)(warning that the Court's decisions "put tens of millions of [innocent] passengers at risk of arbitrary control by the police").

a traffic offender had probable cause to believe that a traffic law had been violated, he *could have* taken the offender into custody and, therefore, *could have* conducted a full search incident to arrest. The Iowa court reasoned that an officer who has elected merely to cite the offender should not be deprived of authority that he *could have* acquired by arresting the offender. Consequently, an officer who issues a citation should be afforded the same authority to search granted by the search incident to arrest doctrine. This reasoning is inconsistent with the substance of the Fourth Amendment and lacks precedential support.

Whether or not an officer *could have* had a basis for searching, if he does not take a motorist into custody he *does not* have a basis for searching. While a real arrest gives rise to real interests, a hypothetical arrest can only engender *hypothetical* interests -- interests that cannot justify a *real* search. Put simply, without custody there is no basis for assuming dangers like those that arise upon arrest. The fact that an officer *could have* arrested a motorist cannot alter that reality.[12]

The hypothetical "could have" reasoning said to support this expansion of the search incident to arrest doctrine opens the door to similar reasoning that would imperil core Fourth Amendment rights. A search incident to citation doctrine, for example, could logically be expanded into a search incident to warning doctrine. If a search incident to citation is reasonable because the officer *could have* arrested the motorist and *could have* searched him if he had arrested him,

[12] This brief assumes *arguendo* that a custodial arrest for this traffic offense would have been constitutional, although probable cause for arrest is not always sufficient to render a custodial arrest constitutional. *See* Brief *Amicus Curiae* of American Civil Liberties Union in *Ricci v. Arlington Heights*, No. 97-501, *certiorari dismissed as improvidently granted* (May 4, 1998).

then a search incident to warning must also be reasonable because the officer *could have* cited the motorist instead of warning him, *could have* arrested him instead of citing him, and *could have* searched him if he had arrested him.

According to this same reasoning, the warrant rule could be eviscerated. An officer who searches on the basis of probable cause alone could plausibly contend that he *could have* secured a warrant, and, therefore, that his warrantless search should be sustained. Moreover, the search incident to arrest doctrine would be susceptible to further unwarranted expansion. A search incident to arrest is invalid if it is "remote in time or place" from the arrest, *see United States v. Chadwick*, 433 U.S. at 15, because the interests that justify such a search are not powerful enough, if they exist at all, when the arrest is remote either in time or place. "Could have" reasoning, however, could undermine these logically grounded and important temporal and spatial limitations. Even though an officer did in fact search an object when it no longer was within the immediate control of a recently arrested suspect, his search would arguably be reasonable because he *could have* searched the object at the earlier time, when it was within the immediate control of the arrestee.[13]

[13] The examples could be multiplied. A hypothetical, "could have"-based extension of the holding of *South Dakota v. Opperman*, 428 U.S. 364 (1976), would allow an officer who elects not to impound a vehicle that is subject to lawful impoundment to "inventory" the vehicle because he *could have* impounded it and *could have* conducted an inventory search if he had impounded it. A hypothetical, "could have"-based extension of the "arrestee inventory" warrant exception recognized in *Illinois v. Lafayette*, 468 U.S. 1213 (1984), would allow officers who release an arrestee immediately after booking to search him if they *could have* held him in jail briefly and, therefore, *could have* conducted a stationhouse search of his person. The fact that no actual incarceration occurred would no longer preclude a reasonable inventory. A hypothetical,

(continued...)

The search incident to arrest doctrine, like these other Fourth Amendment doctrines, is based not on what could have happened, but on what actually did happen. The officer in this case issued petitioner a citation rather than arresting him for speeding. Therefore, there was no occasion for a search incident to arrest.

One might legitimately wonder whether a holding that searches incident to citations are unreasonable will provide any real Fourth Amendment protection. Informed that citations are a constitutionally inadequate foundation for full searches of drivers and vehicles, officers who presently issue citations might respond by taking motorists into custody and searching them incident to arrest. Under the holding of *Whren v. United States*, 517 U.S. 806, the subjective motivations for the custodial arrest -- including the fact that an arrest was performed solely in order to gain authority to search -- would not undermine the validity of a search incident to that arrest. *See id.* at 811-13.

There is reason, however, to question whether officers would actually remain altogether free to make that choice. Political, economic, or other constraints might well make it infeasible for officers to custodially arrest all, or even substantial numbers of traffic offenders. If large numbers of otherwise innocent citizens were taken into custody and searched on the basis of minor traffic offenses, "the people" might well respond by legislatively constricting the arrest

[13] (...continued)
"could have"-based extension of the "protective sweep" doctrine of *Maryland v. Buie*, 494 U.S. 325 (1990), would allow officers to search the home of a suspect arrested a block away based on a reasonable suspicion of dangerous persons inside the home either because an officer *could have* arrested the suspect when he was in his home, but waited until he exited, or *could have* arrested him when he arrived home, but elected to arrest him prior to arrival.

power of officers. Moreover, police departments or legislators might well conclude that custodial arrests of traffic offenders are not the best use of limited law enforcement resources. When officers conduct searches without actually arresting anyone, as they currently do in Iowa, the damage done to individual freedom may escape public notice and debate. If officers are forced to arrest in order to search, the public may well choose to impose constraints that go beyond those required by the Constitution. In sum, a requirement of custodial arrest is not only mandated by the Fourth Amendment, but will also focus public attention on the propriety and desirability of custodial arrests for minor traffic offenses.

B. A Custodial Arrest Requirement for Searches Incident to Arrest Provides Appropriate Guidance for Law Enforcement Officers

Fourth Amendment doctrine, particularly the rules regarding searches incident to arrest, should provide adequate guidance for officers who must make quick decisions in potentially dangerous situations. *See New York v. Belton*, 453 U.S. at 459-60; *United States v. Robinson*, 414 U.S. at 235. A custodial arrest standard is consistent with that goal. The line it draws is no less difficult to understand or apply than that drawn by a citation standard.

Whether an individual has been arrested must be judged by an objective standard. Either a "formal arrest" or its "functional equivalent" should be a sufficient trigger for search incident authority. *Berkemer v. McCarty*, 468 U.S. at 441-42.[14] The "functional equivalent" of a formal arrest

[14] Although *Berkemer v. McCarty* was concerned with the standard for making "custody" determinations under *Miranda*, the Court defined custody by borrowing the Fourth Amendment concept of arrest.

occurs when a "reasonable man in the suspect's position" would conclude that he has had his "freedom of action curtailed to a 'degree associated with formal arrest'" or has been "subjected to restraints comparable to those associated with a formal arrest." *Id.* at 442 (internal citation omitted).

An officer with probable cause to arrest an individual can ensure the validity of a search incident by the simple expedient of informing the person that she is under arrest. Because a lawful "formal arrest" will always justify a search incident, any officer in doubt about her authority needs only to formalize the arrest she intends. An officer who for some reason does not take the step of announcing that the individual is under arrest will not necessarily lack the authority to conduct a search incident to arrest. If the officer has effectively taken (or is taking) a suspect into custody, the fact that the formal arrest follows shortly after the search incident to arrest is of no moment.[15] The determination of whether an arrest has occurred or is occurring is one of substance, not of form.

[15] In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court held that a search of the petitioner's person could qualify as incident to his arrest despite the fact that "the search preceded the arrest rather than vice versa." *Id.* at 111. It was clear that the police "had probable cause to place petitioner under arrest" for possession of a sizable quantity of drugs before conducting the search, and that the petitioner was being taken into custody. Under those circumstances, the Court did not find it "particularly important" that "the formal arrest" did not occur until after the search incident. *Id. Rawlings* stands for the sensible principle that the validity of a search incident to arrest should not depend on whether a "formal arrest" has taken place as long the objective circumstances indicate that the suspect has been or is being taken into custody. A contrary conclusion would have elevated form over substance. *See also Sibron v. New York*, 392 U.S. 40, 67 (1968)(recognizing that when an arrest takes place "is a question of fact" and that an officer was entitled to conduct a search incident once he had taken actions that constituted a *de facto* arrest); *see also People v. Chiagles*, 237 N.Y. at 197 (observing that the common law recognized search incident to arrest authority when the law was "in the act of subjecting the body of the accused to its physical dominion").

Presumably, officers already must apply this objective standard in deciding how coercive they may be toward a suspect seized on a reasonable suspicion of criminal activity or how long they may detain that suspect. Even if an officer does not formalize an arrest, if he subjects a suspect to restraints that amount to a *de facto* arrest and does not have probable cause to arrest, the seizure will be deemed unreasonable. *See Hayes v. Florida*, 470 U.S. 811 (1985); *Royer v. Florida*, 460 U.S. 491 (1983); *Dunaway v. New York*, 442 U.S. 200 (1975). If officers must make such "functional equivalent" determinations for purposes of deciding whether investigatory detentions are constitutionally valid, surely there is no reason they cannot make the same determinations for purposes of deciding whether they are entitled to search a person incident to arrest.

The standard adopted by the Iowa court, permitting searches incident to citation, provides no greater clarity or guidance. According to Iowa law, an officer may exercise that authority when he formally issues a citation prior to the search. *See State v. Meyer*, 543 N.W.2d at 879. However, because form must not govern over substance, the Iowa Supreme Court has also upheld a search incident to citation by an officer who did not formally issue a citation until after the search was conducted. *See State v. Cook*, 530 N.W.2d at 732 n.3. The search incident to citation was sustained because it was clear that the officer was going to complete the citation process at the time of the search. Similarly, under the governing custodial arrest standard, searches incident to arrest are permissible whenever it is clear, from the objective circumstances, that an officer is going to formalize the arrest shortly after the search.

Finally, and most important, the "functional equivalent" of arrest standard reflects core Fourth Amendment values in a way that the decision below simply does not. *See Rakas v. Illinois*, 439 U.S. 128, 152 (1978)(Powell, J., concurring). Conversely, expanding the search incident to arrest doctrine to encompass searches incident to citation any time an arrest could have occurred is wholly inconsistent with the Fourth Amendment's requirement of reasonableness and the right of the people "to be secure in their persons, houses, papers, and effects."

In short, a custodial arrest requirement incorporates a standard that is already reflected in the Court's precedents, provides guidance that is no less clear than the alternative "citation" requirement, and is more faithful to Fourth Amendment objectives. For these additional reasons, the Court should reject Iowa's "search incident to citation" doctrine and hold that suspicionless searches are valid only when an officer lawfully places a person under formal arrest or subjects a person to the functional equivalent of a formal arrest.

CONCLUSION

For the reasons stated above, the judgment of the Iowa Supreme Court should be reversed.

Respectfully submitted,

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